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No. 87-998

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF RICHMOND,

Appellant,

v.

J.A. CROSON COMPANY,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* FOR THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.

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QUESTION PRESENTED

Whether the Fourteenth Amendment prohibits a Municipality from enacting an ordinance requiring prime contractors to subcontract a portion of their city contracts to minority businesses.

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BRIEF AMICUS CURIAE FOR THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF APPELLANT

INTEREST OF AMICUS

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation formed to assist blacks to secure their constitutional and civil rights by means of litigation. Since 1965 the Fund's attorneys have represented

plaintiffs in several hundred employment discrimination actions under Title VII and the Fourteenth Amendment, including many of the employment discrimination cases decided by this Court. In attempting to frame remedies to redress, prevent and deter discrimination, we have repeatedly found, as have the courts hearing those cases, that race-conscious numerical remedies are, for a variety of pragmatic reasons, a practical necessity. The Legal Defense Fund believes that its experience in this area of litigation and the research it has done will assist the Court in this case. The parties have consented to the filing of this brief and letters of consent have been filed with the Clerk.

SUMMARY OF ARGUMENT

In the years since this Court's decision in Fullilove v. Klutznick, 448 U.S. 448 (1980), minority set-aside programs have been widely adopted by state and local governments. Many of these programs, including the program at issue here, were modeled on the federal program upheld in Fullilove. The decision of the Fourth Circuit, invalidating Richmond's program, challenges the authority of state and local governments to prohibit discrimination by private parties contracting with the city, and accordingly to remedy the effects of that discrimination.

The Fourteenth Amendment does not provide a basis for this limitation of the power of state and local governments. Indeed, state and local authorities have

an important and compelling interest in addressing economic disparities in their communities. This interest is particularly compelling when that disparity is rooted in racial discrimination.

The legislative history of the Fourteenth Amendment unambiguously establishes the permissibility of racial classifications offered to remedy the effects of invidious discrimination. Significantly, the Congress which passed the Amendment also adopted a number of race-conscious laws designed to ameliorate the economic condition of blacks during the post Civil War period.

The focus of state and local minority set-aside programs, using the federal program as a model, has been aimed at similar problems. Where Congress found a national pattern of exclusion of blacks

from government contracts and the attendant inhibitions to the development of black business, state and local governments have found the same. Where Congress moved to remedy this economic disparity, state and local governments have made similar efforts.

Such voluntary initiatives by state and local governments, which have adopted as their own the national goal of equal opportunity, should not be thwarted.

ARGUMENT

I.

MUNICIPALITIES HAVE A SUFFICIENTLY WEIGHTY STATE INTEREST IN PROGRAMS THAT GIVE MINORITY COMMUNITIES INDEPENDENT ECONOMIC VIABILITY

Federal, State and Municipal governments have a sufficiently weighty

state interest in increasing the economic strength of the minority community, whether that interest is defined as "compelling" or "important". This is particularly the case where, as here, the obstacles facing minority business persons have their roots in historical patterns of racial discrimination.

> "These problems, which are economic in nature, are the result of past social standards which linger as characteristics of minorities as a group."[1]

Notably, this Court has indicated that there may be several ways in which to define a state's interest in affirmative action efforts, which do not necessarily require a determination of discrimination.

> . . . [A]though its precise contours are uncertain, a state interest in the promotion of racial diversity has been found

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[1] Subcommittee on Minority Small Business Enterprise of the House Small Business Committee H. Rep. 92-1615, p. 3.

> sufficiently "compelling" at least in the context of higher education, to support the use of racial considerations in furthering that interest. See, e.g., Bakke, 438 U.S. at 311-315 . . . (Opinion of Powell, J.,) . . . And certainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently "important" or "compelling" to sustain the use of affirmative action policies.

Wygant v. Jackson Board of Education, 476 U.S. ___, ___ , 90 L.Ed. 2d 260, 276-277 (1986).

In 1975 the Subcommittee on Minority Small Business Enterprise of the House Small Business Committee observed that,

> While minority persons comprise about 16 percent of the Nation's population, of the 13 million businesses in the United States, only 382,000, or approximately 3.0 percent, are owned by minority individuals.[2]

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2 H. Rep. 94-468, pp. 1-2.

The problem there identified continues to plague the minority community today. That is, while minority persons comprise 15.2%[3] of the nation's population, the latest economic figures available show that only approximately 5% of businesses are owned by minorities and that they receive only 1-2% of the gross receipts from all contracting.[4]

It is now well established that governmental bodies ". . . may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination". United States v. Paradise, 107 S.Ct. 1053, 1063 (1987). Indeed the Court's commitment to

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[3] Current Population Survey, U.S. Census Bureau (Mar. 1987).

[4] Survey of Minority-Owned Business (U.S. Census Bureau 1982); 1982 Economic Census (U.S. Census Bureau 1982).

this principle has substantially diminished the difference between whether the government's interest in remedying such discrimination is "compelling" or "important". See Wygant v. Jackson Board of Education, 90 L.Ed. 2d 260, 268 (1986)(opinion of Powell, J.,)(the means chosen must be "narrowly tailored" to achieve a "compelling government interest"); id., at 276, (O'Connor, J. concurring)("The Court is in agreement that . . . remedying past or present racial discrimination. . . is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program"); id., at 286, (Marshall, J., dissenting, joined by Brennan, J. and Blackmun, J.)(remedial use of race permissible if it serves "important governmental objectives"

and is "substantially related to achievement of those objectives").

It follows that the attempts, whether by Congress, or by State or Municipal legislatures, to prevent the perpetuation of discrimination in the construction industry, satisfies the governments' "legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination". University of California Regents v. Bakke, 438 U.S. 265, 307 (1978) (Opinion of Powell, J.)

The use of such race-conscious measures here, as in the federal acts approved by this Court in Fullilove v. Klutznick, 448 U.S. 448 (1980), and as replicated by cities and municipalities around the country as they have tried to deal with similar problems of discrimination, is with consistent with the use

of such measures as envisioned by the Congress which fashioned the Fourteenth Amendment.

II.

THE FOURTEENTH AMENDMENT SUPPORTS THE USE OF GOVERNMENT PROGRAMS TO IMPROVE ECONOMIC AND OTHER OPPORTUNITIES FOR RACIAL MINORITIES[5]

The Congress which fashioned the Fourteenth Amendment squarely considered the propriety of race-conscious remedies in support of black victims of racial discrimination. Thus while the Amendment

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[5] For an extensive discussion of the Fourteenth Amendment and the series of social welfare laws adopted by the Congress which fashioned that amendment See, Brief of the NAACP Legal Defense and Educational Fund, Inc., as Amicus Curiae, The Regents of the University of California v. Allan Bakke, No. 76-811; See also, Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 Virginia L. Rev. 753 (June 1985).

plainly prohibits any racial classification which has the purpose or effect of stigmatizing as inferior any racial or ethnic group,[6] the history of

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[6] Certainly a perception of the unconstitutionality of invidious and stigmatizing racial classifications was at the heart of this Court's landmark decision in Brown v. Board of Education, 347 U.S. 483 (1954). See also, Strauder v. West Virginia, 100 U.S. 303, 308 (1880). Cf. United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977), there, three members of the Court found New York's redistricting plan constitutionally acceptable despite the fact that the State "used race in a purposeful manner" because "its plan represented no racial slur or stigma with respect to whites or any other race" - the State's action was thus "not discrimination violative of the Fourteenth Amendment." 51 L.Ed. 2d at 246 (opinion of Justice White for the Court). Two other members of the Court agreed that "[u]nder the Fourteenth Amendment the question is whether the reapportionment plan represents purposeful discrimination against white voters . . . . The clear purpose with which the New York Legislature acted - in response to the position of the United States Department of Justice under the Voting Rights Act- forecloses any finding that it acted with the invidious purpose of discriminating against white voters." 51 L.Ed. 2d at 254-255 (concurring opinion of Justice

the Fourteenth Amendment demonstrates that the framers intended it to legitimate and to allow implementation of race-specific remedial measures where a substantial need for such programs was evident. Indeed, Congress believed that such programs were not merely permissible but necessary.

From the closing days of the Civil War until the end of civilian Reconstruction, Congress adopted a series of social welfare laws expressly delineating the entitlement of blacks to participate in or benefit from various programs. Congress adopted these race-specific measures over the objections of critics who opposed such special assistance for a single racial group. The most far reaching of these programs, the 1866 Freedmen's Bureau Act, was enacted less than a month after Congress approved

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the Fourteenth Amendment, and there is substantial evidence that a major reason Congress adopted the Amendment was to provide a clear constitutional basis for such race-conscious remedies.

The range and diversity of these measures is striking. However, they share the clear aim of assisting and encouraging blacks in attaining some measure of economic independence, notwithstanding the ravages and consequences of slavery. The Bureau of Refuges, Freedmen and Abandoned Lands, (popularly known as the Freedman's Bureau) was authorized by Congress in 1866 to provide land and buildings and spend designated funds for "the education of the freed people,"[7] but could provide no such aid to refugees or other whites. The same statute conveyed a number of disputed

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[7] 14 Stat., c.200 at 174, 176 (1866).

lands to "heads of families of African races" and authorized the sale of some thirty-eight thousand other acres to black families who had earlier occupied them under authority of General Sherman.[8] Congress in 1867 made special provision for disposing of claims for "pay, bounty, prize-money, or other moneys due . . . colored soldiers, sailors, marines, or their legal representatives".[9] It awarded federal charters to organizations

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[8] 14 Stat., c.200 at 174, 175 (1866). The statute referred simply to "such persons and to such only as have acquired and are now occupying lands under and agreeably to the provisions of General Sherman's special field order, dated at Savannah, Georgia, January sixteenth, eighteen hundred and sixty-five." That order, as Congress well knew, provided that the land in question in South Carolina Georgia was "reserved and set apart for the settlement of the negroes now made free by the acts of war and the proclamation of the President of the United States". II W. Fleming, Documentary History of Reconstruction 350 (1906).

[9] 15 Stat., Res. 25 at 26 (1867).

established to "suppor[t] . . . aged or indigent and destitute colored women and children,"[10] to serve as a bank for "persons heretofore held in slavery in the United States, or their descendants,"[11] and to "educate and improve the moral and intellectual condition of . . . the colored youth of the nation"[12]. These youths were also provided assistance in the form of funds[13] and land grants.[14] Express appropriations were made for "the relief of freedmen or destitute colored people in the District of Columbia,"[15] and

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10 12 Stat., c.33 at 650 (1863).

11 13 Stat., c.92 at 511 (1865).

12 12 Stat., c.103 at 796 (1863).

13 14 Stat., c.296, 317,(1863). Such assistance continued after the end of Reconstruction.

14 12 Stat., c.33 at 650 (1863). Such assistance continued after the end of Reconstruction.

15 15 Stat., Res. 4 at 20 (1867).

for a hospital for freedmen established in the District.[16] No comparable federal programs existed or were established for whites, although a few programs, while open to all blacks, were also available to a limited group of whites, the unionist refugees who fled to the North during the Civil War. Such white refugees were entitled, along with the freedmen, to up to 40 acres of land from among property seized by the United States from confederate sympathizers.[17]

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[16] See e.g., 16 Stat., c.14, 8 (1869); 16 Stat., c.114 at 506-507 (1871); 17 Stat., 366, 528 (1872). In years prior to these appropriations the hospital was supported by the Freedman's Bureau.

[17] 13 Stat., c.90 at 508-509 (1865); this 1865 program, however, was largely eliminated when President Johnson directed the return of most of the seized property to its original owners. See Report of the Commissioner of the Bureau of Refugees, Freedmen and Abandoned Lands, H.R. Exec. Doc. No. 11, 39th Cong. 1st Sess. 4-5 (1865); II O. Howard, Autobiography 229, 233, 235 (1907); II J. Blaine, Twenty Years in Congress 164

These racial distinctions imposed by Congress were neither inadvertent nor unopposed. A vocal minority in Congress, as well as President Johnson, criticized such proposals as class legislation discriminating against whites. A substantial majority of the Congress, however, believed such special treatment was appropriate and necessary to remedy the past mistreatment of blacks.

The Fourteenth Amendment was fashioned and approved by the same Congress that deliberately enacted race-conscious remedies for the exclusive or primary benefit of blacks. Indeed, one of the chief purposes of the Fourteenth Amendment was to provide a constitutional

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(1886); G. Bently, A History of the Freedmen's Bureau 89-96 (1955).

basis for the remedies which the Thirty-Ninth Congress had already adopted.[18]

> The one point upon which historians of the Fourteenth Amendment agree, and, indeed which the evidence places beyond cavil, is that the Fourteenth Amendment was designed to place the constitutionality of the Freedmen's Bureau and civil rights bills. . . beyond doubt. . . .[T]he new amendment was written and passed, at the very least, to make certain that that s t a t u t o r y p l a n w a s constitutional, to remove doubts about the adequacy of the Thirteenth Amendment to sustain it, and to place its substantive

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[18] See H. Flack, The Adoption of the Fourteenth Amendment 11 (1908):

> "The legislation preceding the adoption of the Amendment will probably give an index to the objects Congress was striving to obtain or to the evils for which a remedy was being sought. . . This legislation, together with the debates in Congress, while being considered by that body, as well as the debates on the Amendment itself, should afford . . . sufficient material and facts on which to base a fairly accurate estimate of what Congress intended to accomplish by the Amendment."

provisions in the Constitution.[19]

When President Johnson on February 19, 1866, vetoed the first Freedmen's Bureau Bill of 1866, he had questioned whether the measure was "warranted by the Constitution" and challenged in particular the authority of Congress to spend funds, at least outside the District of Columbia, for the assistance of any class of the needy. In that month, Congress was already debating an early draft of the Fourteenth Amendment, H.R. 63, which gave Congress the authority similar to that now contained in Section 5.[20] On February 28,

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[19] J. tenBroek, Equal Under Law 201, 203 (1965).

[20] The Amendment then before the House provided, "The Congress shall have power to make all laws which shall be necessary and proper to secure the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection of the rights of life, liberty, and property". H.R. 63,

1866, nine days after the veto, Congressman Woodbridge, after reciting the need for federal aid to destitute freedmen, argued:

> But it may be said that all this may be done by legislation. I am rather inclined to think that most of it may be so accomplished. But the experience of this Congress in that regard has been most unfortunate. Sir, I cast no imputation upon the President of the United States . . . . But inasmuch as the President, honestly, I have no doubt, has told us that there were constitutional difficulties in the way. I simply suggest that we submit the proposition to the people, that they may remove these objections by amending the instrument itself.[21]

The Freedmen's Bureau Act of 1866, the Reconstruction measure which probably contained the most race-specific remedial legislation, was considered simultaneously in Congress with the Fourteenth Amendment.

39th Cong., 1st Sess. (1866) Globe 1034.

21 Id. at 1088.

The House passed the Amendment on May 10, 1866, the Senate voted a modified version on June 8, 1866,, and the House acquiesced in the Senate changes on June 13.[22] The House approved the second Freedmen's Bureau Act on May 29, 1866, the Senate voted a modified version on June 26, 1866,[23] and the Conference Report was adopted on July 2 and 3, 1866. On several occasions the Act was debated in one House at the same time the Amendment was being debated in the other.[24]

Moreover, the same legislators who comprised the two-thirds majority necessary to override President Johnson's second veto of the Freedmen's Bureau Act of 1866 also composed the two-thirds

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22 Id. at 2545, 3042, 3149.

23 Id. at 2773, 3413, 3524, 3562.

24 See e.g., Id. at 2799, 2807, 2869, 2977.

majority who approved the Fourteenth Amendment.[25] The sponsors of the Amendment, Congressman Stevens and Senator Wade, as well as its apparent author, Congressman Bingham, all voted for the Freedmen's Bureau Act. The sponsors of the Act, Senator Trumbull and Congressman Eliot, voted for the Amendment; Eliot spoke at length in support of the Amendment,[26] and Trumbull wrote and sponsored the 1866 Civil Rights Act whose substantive provisions were the basis of section 1 of the Amendment.[27]

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[25] Of the 33 Senators and 104 Representatives who voted to override President Johnson's second veto of the Freedmen's Bureau Act, all who were present for the vote on the Fourteenth Amendment voted for it. Of the 33 Senators and 120 Representatives who voted for the Amendment, all but 4 representatives who were present for the vote or the veto voted to override it. Id. at 3042, 3149, 3842, 3850.

[26] See, e.g., id. at 2511-12.

[27] See Flack, op. cit., at 55-97.

Congressman Stevens, introducing the Fourteenth Amendment to the House, described its basic purpose as providing for "the amelioration of the condition of the freedmen".[28] These are exactly the same words which Congressman Moulton used only three months earlier to describe the object of the first Freedmen's Bureau Bill of 1866.[29] This identity of phrasing reflects the similarity of purpose underlying the two measures. The supporters of the Act and Amendment regarded them as both consistent and complementary, while opponents viewed the two, together with the Civil Rights Act of 1866, as part of a single coherent, though in their view, undesirable, policy.[30] No

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28 Globe 2459.

29 Id. at 632.

30 Id. at 2501 (remarks of Rep. Shanklin); 2537-8 (remarks of Rep Rogers); 2941 (remarks of Sen. Hendricks); App.

member of Congress intimated he saw any inconsistency between the Thirteenth Amendment, which advocates of the bill contended provided authority to establish and continue the Bureau, and the Fourteenth Amendment. During the debates on the Amendment, opponents frequently went out of their way to criticize the Freedmen's Bureau,[31] while supporters of the Amendment praised the Bureau.[32]

The Thirty-Ninth Congress was fully aware of the race-conscious remedies and limitations contained in the Freedmen's Bureau Acts it passed in February and July of 1866. It could not conceivably have intended by its approval of the Fourteenth

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239040 (remarks of Rep. Shanklin).

31 Globe at 2472 (remarks of Rep. W. Black); 2501 (remarks or Rep. Shanklin).

32 Id. at 1092 (remarks of Rep. Bingham 3034-35 (remarks of Sen. Henderson).

Amendment on June 12, 1866, to invalidate or forbid such remedies. The debates in that Congress literally ring with an uncannily modern reverberation: the opposition to the Freedmen's Bureau Acts and other race specific remedies was expressed in much the same terms as contemporary arguments against such measures as the Appellant's set aside program. These opponents - then and now- have contended that government should be prevented from providing special assistance for racial groups whose members have for generations suffered invidious discrimination, although the lack of remedial treatment is likely, as here, to perpetuate the exclusion of these groups from important areas of American life. This view was repeatedly and resoundingly rejected over a hundred years ago, and

insofar as such arguments are now raised, they do not withstand analysis.

III.

THE GOAL OF MINORITY SET-ASIDE PROGRAMS IS TO EXPAND THE ECONOMIC VIABILITY OF THE BLACK COMMUNITY, NOT SIMPLY TO APPORTION OPPORTUNITIES TO A LIMITED NUMBER OF EXISTING MINORITY CONCERNS

The Fourth Circuit's application of Wygant assumes that the purpose of the program was to apportion business to already existing black enterprises. This approach ignores the principle aim of all set aside programs: that is, providing a fair opportunity for excluded segments of the community to compete, by compensating for the competitive disadvantages they face because of their virtual exclusion from the marketplace. It follows that essential to the achievement of this goal

are programs which create as well as perpetuate black businesses.

The philosophical underpinning for these programs is particularly evident in the federal model, which Richmond and other cities have tried to emulate, and which this Court approved in Fullilove v. Klutznick, 448 U.S. 448 (1980).

The problems of minority business became a major federal priority in 1969 when President Nixon signed Executive Order 11458, providing for the development of a national program to assist "the establishment, preservation and strengthening of minority business enterprise." Section 1(a)(i). In 1971 and 1972 the subcommittee on Minority Small Business Enterprise of the House Small Business Committee conducted extensive hearings on the obstacles facing minority businesses. It concluded that

the obstacles had their roots in past racial discrimination. "These problems, which are economic in nature, are the result of past social standards which linger as characteristics of minorities as a group." H. Rep. 92-1615, p.3. The "long history of racial bias" to which minorities had been subjected invariably led, it found, to the lack of capital and experience which seriously handicapped the efforts of minority entrepreneurs. Id. at 3-4.

In 1975 that House subcommittee again conducted several days of hearings on this subject, and found the continuing problems of minority businesses to have the same origin.

> The effect of past inequities stemming from racial prejudice have not remained in the past. The Congress has recognized the reality that past discriminatory practices have, to some degree, adversely

> affected our present economic system.
>
> While minority persons comprise about 16 percent of the Nation's population, of the 13 million businesses in the United States, only 382,000, or approximately 3.0 percent, are owned by minority individuals. The most recent data from the Department of commerce also indicates that the gross receipts of all businesses in this country totals about $2,540.8 billion, and of this amount only $16.6 billion, or about 0.65 percent was realized by minority business concerns.
>
> These statistics are not the result of random chance. The presumption must be made that past discriminatory systems have resulted in the present economic inequities.[33]

The subcommittee reiterated that conclusion on January 3, 1977, two years later:

> The very basic problem disclosed by the testimony is that, over the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of

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33 H. Rep. 94-468, pp. 1-2.

> conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities.[34]

This latter report was issued less than two months before the adoption of the MBE provision by the House.

To eliminate the continuing effects on minority businesses of past discrimination, the federal government had adopted over 100 programs to aid minority businesses. These programs included

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[34] H. Rep. 94-1791, p. 132; see also S. Rep 91-1343, p. 45 (1970). A federal task force reached the same conclusion. Report of the Task Force on Education and Training for Minority Business Enterprise, p. 17 (1974) ("Decades of prejudice, poor educational opportunity, limited access to real management positions within American business and industry have conspired to restrict the entry of minorities into the mainstream of the nation's free enterprise system.")

financial, marketing and business management assistance.[35] But despite the substantial federal efforts to create and sustain minority businesses, those firms received less than one percent of all federal contracts.

The Minority Business Enterprise Amendment was introduced by Congressman Parren Mitchell of Maryland. In his remarks on the floor of the House, Congressman Mitchell plainly stated that the developmental purposes of the setaside program, and the wide ranging benefits he saw as flowing from that development.

> The Congress concerns itself with the fiscal problems of the cities, crime, and unemployment. I submit to my colleagues that urban development and fiscal stability is tantamount to minority business development; reductions

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35 U.S. Department of Commerce, Office of Minority Business Enterprise. Federal Assistance Programs for Minority Enterprises (1977).

> in crime and a reevaluation in the value of life is tantamount to minority business development; and reductions in unemployment causing additional demand and growth are directly related to minority business development.
>
> I urge my colleagues to support my amendment and promote growth in the minority business community.[36]

As the history of the Minority Business Enterprise Amendment makes plain, Congress did not intend to wed the reach of the amendment to the artificially restricted pool of existing minority businesses. For example, as recounted by the Chief Justice in Fullilove, the Senate version of the MBE amendment, introduced by Senator Brooke of Massachusetts, contained a provision not included in the House version. Senator Brooke's provision sought to insure that the 10% figure did

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[36] 123 Cong. Rec. H 5098 (remarks of Rep. Mitchell)(daily ed. Feb. 23, 1977).

not constitute an inflexible quota in the face of a minority population which was fewer than 10%, by keying the set-aside to the number of minority businesses in the relevant community.

Senator Brooke's amendment would have tied the set-aside to the actual number of contractors only when the minority population was significantly less than 10%; however, even this limited effort to link the set-aside with the actual number of minority businesses as opposed to the percentage of minority population was rejected by the Conference Committee. Rather, as observed by Chief Justice Burger, "The Conference Committee Reports added only the comment: 'This provision shall be dependent on the availability of minority business enterprises located in the project area'". 448 U.S. at 462. [quoting S Conf Rep No. 95-110, p.11

(1977); HR Conf Rep No. 95-230, p.11 (1977). The Conference Committee bill was agreed to by the Senate, 123 Cong. Rec 12941-12942 (1977), and by the House, id., at 13242-13257, and was signed into law on May 13, 1977.]

Justice Powell's opinion similarly recognized that it was a purpose of the set-aside program to help "develop" minority business. Quoting Congressman Mitchell's description of his proposal, Justice Powell observed:

> He described his proposal as "the only sensible way for us to begin to develop a viable economic system for minorities in this country, with the ultimate result being that we are going to eventually be able to . . . end certain programs which are merely support survival programs for people which do not contribute to the economy". 123 Cong Rec 5327 (1977).

448 U.S. at 504.

Regarding the reasonableness of the 10% set-aside figure, Justice Powell plainly rejected the view that the set-aside had to be exactly related to the percentage of minority businesses already in existence.

> Only 4% of contractors are members of minority groups. see Fullilove v. Kreps, 584 F2d 600, 608 (1978), although minority group members constitute about 17% of the national population, see Constructors Association of Western Pennsylvania v. Kreps, 441 FSupp 936, 951 (WD Pa 1977), aff'd, 573 F2d 811 (CA3 1978). The choice of a 10% set-aside thus falls roughly halfway between the present percentage of minority contractors and the percentage of minority group members in the Nation.

448 U.S. at 513-14.

Implicit in the Congressional approval of the Minority Business Enterprise Amendment as well as this Court's sustaining of that measure, is an understanding of the economic consequences

of generations of invidious discrimination.

> Although the Act recites no preambulary "findings" on the subject, we are satisfied that Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination. Accordingly, Congress reasonably determined that the prospective elimination of these barriers to minority firm access to public contracting opportunities generated by the 1977 Act was appropriate to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments, which is one aspect of the equal protection of the laws. Insofar as the MBE program pertains to the actions of state and local grantees, Congress could have achieved its objectives by use of its power under § 5 of the Fourteenth Amendment.

448 U.S. at 478.(Berger, C.J.).

The ultimate goal of such programs is the achievement of an economic equilibrium in which the percentage of minority

businesses is roughly equal to the percentage of minorities in the population. Since we have not yet reached that economic equilibrium, to limit the goals of the setaside programs to the number of existing minority businesses, would mean locking in a structure of inequality.[37] Therefore, the goals must be set so as to offset this imbalance, and move toward providing a fair share of the business opportunities available to the minority community.

> The time cannot come too soon when no governmental decision will be based upon immutable characteristics of pigmentation or origin. But in our quest to achieve a society free from

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37 As noted by the dissent below, the result of the Fourth Circuit's analysis is "a proof scheme . . . [that] would ensure the continuation of a systemic fait accompli, perpetuating a qualified minority contractor pool that approximates two-thirds of one percent of the overall contractor pool". (footnote omitted) 822 F.2d 1355, 1365 (4th Cir. 1987).

> racial classification, we cannot ignore the claims of those who still suffer from the effects of identifiable discrimination.

448 U.S. at 516, (Powell, J.).

No less than Congress, State and local governments have a right and a responsibility to cure the effects and prevent the perpetuation of discrimination, particularly where public actions intersect with private enterprise. Indeed this Court has consistently recognized the power of the States to prohibit discrimination by private parties and to remedy the effects of such discrimination.

> A contrary position would conflict with the traditional understanding recognizing the competence of the States to initiate measures consistent with federal policy in the absence of congressional pre-emption of the subject matter. Nothing whatever in the legislative history of either the Fourteenth Amendment or the Civil Rights Act even remotely suggests that the States are

> foreclosed from furthering the fundamental purpose of equal opportunity to which the Amendment and those Acts are addressed. Indeed, voluntary initiatives by the States to achieve the national goal of equal opportunity have been recognized to be essential to its attainment.

University of California Regents v. Bakke, 438 U.S. 265, 368 (1978)(Brennan, White, Marshall and Blackmun, JJ.)(Concurring in part and dissenting in part).

In Railway Mail Assn. v. Corsi, 326 U.S. 88 (1945), this Court established the principle that a state could voluntarily exceed the requirements of the Fourteenth Amendment in eliminating private racial discrimination. Concurring in that judgment, Justice Frankfurter plainly stated the rationale for that holding.

> To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment.

Id. at 98.

CONCLUSION

For the above reasons the decision of the court of appeals should be reversed.

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